Supreme Court, U.S.
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No. 01-

IN THE

Supreme Court of the United States

STATE OF OKLAHOMA ex rel., THE BOARD OF REGENTS OF THE UNIVERSITY OF OKLAHOMA and BILL BARRINGER,

Petitioners,

v.

RETTA E. CORNFORTH,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

FRED R. GIPSON
Attorney for Petitioners
University of Oklahoma
Health Sciences Center
Office of Legal Counsel
1000 Stanton L. Young Boulevard
Room 233
Oklahoma City, Oklahoma 73190
(405) 271-2033

170936

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

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QUESTION PRESENTED

Unlike the Fourth Circuit, the Tenth Circuit ruled in this case that Eleventh Amendment sovereign immunity does not bar a private action against a state supervisor in his individual capacity as an "employer" under the Family Medical Leave Act of 1993 ("FMLA"), even though the state itself has sovereign immunity from suit. The question presented in this petition is as follows — Can a state supervisor be sued in his individual capacity as an "employer" under the FMLA, when Eleventh Amendment sovereign immunity prohibits the state itself from being sued?

OPINIONS BELOW

The district court's opinion denying Petitioners' motion to dismiss based upon Eleventh Amendment sovereign immunity (Appendix "Pet. App." at 13a) is not published. The court of appeals' opinion affirming the district court's denial of Eleventh Amendment sovereign immunity (Pet. App. at 1a) is published at 263 F.3d 1129. The court of appeals' order denying rehearing and rehearing en banc (Pet. App. at 32a) is not published.

STATEMENT OF JURISDICTION

The court of appeals entered its opinion and order on August 16, 2001, and denied rehearing and rehearing en banc on September 21, 2001. Petitioners invoke this Court's jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The provisions of the Family Medical Leave Act of 1993, 42 U.S.C. § 2601, *et seq.*, relevant to this petition are reprinted in the Appendix at 34a.

STATEMENT OF THE CASE

The plaintiff in this case, Retta A. Cornforth, is a former staff employee of the petitioner, State of Oklahoma, ex. rel., Board of Regents of the University of Oklahoma ("University"). The petitioner, Bill Barringer ("Barringer"), was plaintiff's immediate supervisor at the University prior to the termination of the plaintiff's employment. Following the termination of her employment, the plaintiff filed the underlying action alleging, among other things, that the University and Barringer violated plaintiff's rights under the FMLA.[1]

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1. The plaintiff contends that she suffered from a "serious health condition" as defined by 29 U.S.C. § 2612(a)(1)(D). The plaintiff further contends that she did not receive the benefits to which she was purportedly entitled under the FMLA, and was terminated by the Petitioners in retaliation for her alleged attempt to exercise leave rights under the FMLA. The Petitioners have denied these allegations.

Both the University and Barringer moved to dismiss the plaintiff's FMLA claim on the ground of Eleventh Amendment sovereign immunity. The district court below granted the University's motion to dismiss the plaintiff's FMLA claim on the ground that the University, as an arm of the State, had Eleventh Amendment sovereign immunity from suit. The district court ruled, however, that Barringer did not have sovereign immunity from suit under the FMLA because the FMLA defined the term "employer" broadly enough to encompass state supervisors in their individual capacities.

The Petitioners thereafter appealed the district court's ruling to the Tenth Circuit. On appeal to the Tenth Circuit, the Petitioners argued that a special sovereignty interest of the state is implicated when a private suit is filed against a state supervisor in his/her individual capacity under the FMLA. The Petitioners also argued on appeal that to permit private suits against individual state supervisors as "employers" under the FMLA, effectively eviscerates the states' Eleventh Amendment sovereign immunity from suit.

The Tenth Circuit affirmed the district court's denial of Eleventh Amendment sovereign immunity to Barringer. In so doing, the Tenth Circuit found the Petitioners' arguments to be "totally without merit." (Pet. App. at 9a). The arguments advanced by the Petitioners to the Tenth Circuit, however, are precisely the conclusions reached by the Fourth Circuit in *Lizzi v. Alexander*, 255 F.3d 128 (4th Cir. 2001):

> To hold that individual supervisors, as "employers", may be sued under the [FMLA] while also holding that the Constitution prohibits the state itself from being sued would undermine the Supreme Court's decisions in *Garrett*, *Kimel*, and *Seminole Tribe*. Plaintiffs like Lizzi would be able to evade the Eleventh Amendment prohibition against suing a state merely by naming the individual supervisor as the employer.

> We refuse to create such an anomaly. The state would still suffer the indignity of having each discrete decision regarding personnel or organizational matters subject to second-guessing by a federal court. "The real interests served by the Eleventh Amendment are not to be sacrificed to elementary mechanics of captions and pleadings." *Coeur d'Alene*, 521 U.S. at 270, 117 S. Ct. 2028. A rule permitting such individual liability would do nothing more than "adhere to an empty formalism and [would] undermine the principle, reaffirmed . . . in *Seminole Tribe*, that Eleventh Amendment immunity represents a real limitation on a federal court's federal-question jurisdiction." Because [the state] enjoys Eleventh Amendment immunity for claims brought under the FMLA, the individual supervisors under the FMLA are protected by that same immunity. . . . The FMLA does not permit a plaintiff to evade the strictures of sovereign immunity by suing the individual defendants as the employer rather than the state.

See Lizzi v. Alexander, 255 F.3d at 137-38.

Because of the obvious and drastic conflict that exists between the Tenth Circuit and Fourth Circuit on the question presented herein, and because Petitioners believe that the Tenth Circuit's decision effectively eviscerates the states' Eleventh Amendment sovereign immunity from suit, this Petition for Writ of Certiorari has been filed.

REASONS FOR GRANTING THE WRIT

The petition should be granted because the Tenth Circuit has rendered a published decision in this case in direct conflict with a published decision of the Fourth Circuit on the same question which is of exceptional importance. In *Lizzi v. Alexander*, the Fourth Circuit squarely held that Eleventh Amendment sovereign immunity does in fact bar private actions

against state supervisors under the FMLA in their individual capacities. *Id.* at 137-38. In so holding, the Fourth Circuit found that to permit individual suits against state supervisors as "employers" under the FMLA, would undermine the decisions of the Supreme Court regarding Eleventh Amendment sovereign immunity, and would reduce Eleventh Amendment immunity to nothing more than an "empty formalism". *Id.*

The Tenth Circuit, on the other hand, held in this case that Eleventh Amendment sovereign immunity does not bar a private action against a state supervisor in his individual capacity under the FMLA, even though the state itself has sovereign immunity from suit. (Pet. App. at 8a, 11a). In fact, the Tenth Circuit found that the Petitioners' "argument that the University's immunity will be eviscerated [which was the conclusion of the Fourth Circuit] . . . is totally without merit." (*Id.* at 9a). There is an obvious and fundamental disagreement between the circuit courts which Petitioners respectfully submit should be resolved by this Court.

This petition should also be granted because the Tenth Circuit's decision reduces Eleventh Amendment sovereign immunity to nothing more than an empty formalism. This was expressly forbidden in *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 117 S. Ct. 2028, 138 L. Ed. 2d 438 (1997):

> When suit is commenced against state officials, even if they are named and served as individuals, the State itself will have a continuing interest in the litigation when state policies or procedures are at stake. . . . Eleventh Amendment immunity represents a real limitation on a federal court's federal-question jurisdiction. The real interests served by the Eleventh Amendment are not to be sacrificed to elementary mechanics of captions and pleadings.

Coeur d'Alene, 521 U.S. at 269-70.

Every circuit that has examined whether the FMLA is a valid abrogation of state sovereign immunity, has held that the

FMLA does ***not*** validly abrogate the states' Eleventh Amendment immunity from private suits. *See Lizzi v. Alexander*, 255 F.3d at 135. If Congress is permitted to side-step this constitutional bar to the creation of private suits against the states by defining state employees in their individual capacities as the "employer" (which is an absolute fiction since the state is the employer and not its individual employees)[2], then sovereign immunity is indeed eviscerated. As aptly held by the Fourth Circuit, a private suit under the FMLA against a state supervisor as the purported "employer" of a plaintiff, remains an attack on the personnel and organizational policies and decisions of the state itself. *See Lizzi v. Alexander*, 255 F.3d at 137-38.

One of the central reasons why state sovereign immunity against private suits was preserved by the Founders of the Constitution, was because there is no political responsibility or accountability to control the filing of lawsuits by private individuals. *See, Alden v. Maine*, 527 U.S. 706, 755-56, 119 S. Ct. 2240, 144 L. Ed. 2d 636 (1999). If the Tenth Circuit decision is allowed to stand, private individuals will be free to challenge, at their will and discretion, the FMLA policies and personnel decisions of the states, simply by suing their state supervisors in their individual capacities as the purported "employer". As correctly recognized by the Fourth Circuit, such a result, if permitted, would undermine the principles of Eleventh Amendment sovereign immunity.

CONCLUSION

For the foregoing reasons, the Petitioners respectfully submit that this petition for writ of certiorari should be granted.

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2. The FMLA defines the term "employer" to include "any person who acts, directly or indirectly, in the interest of an employer to any of the employees of such employer." *See* 29 U.S.C. § 2611(4)(A)(ii)(I).

Respectfully submitted,

FRED R. GIPSON
Attorney for Petitioners
University of Oklahoma
Health Sciences Center
1000 Stanton L. Young Boulevard
Room 233
Oklahoma City, Oklahoma 73190
(405) 271-2033

APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT DATED AND FILED AUGUST 16, 2001

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 00-6119

RETTA E. CORNFORTH,

Plaintiff-Appellee,

v.

UNIVERSITY OF OKLAHOMA BOARD OF REGENTS, d/b/a UNIVERSITY OF OKLAHOMA HEALTH SCIENCES CENTER AT OKLAHOMA CITY; BILL BARRINGER,

Defendants-Appellants.

Appeal from the United States District Court
for the Western District of Oklahoma
(D.C. No. CIV-99-1840-A)

* * *

Before **BRISCOE, MURPHY**, Circuit Judges, and **CROW**, District Judge.*

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* Honorable Sam A. Crow, District Judge, United States District Court for the District of Kansas, sitting by designation.

Appendix A

MURPHY, Circuit Judge.

I. INTRODUCTION

After plaintiff-appellee, Retta Cornforth, was terminated from her position as a medical staff secretary at the University of Oklahoma, she sued both the Board of Regents of the University of Oklahoma (the "University") and her supervisor, Bill Barringer, alleging, *inter alia*, violations of the Pregnancy Discrimination Act, Title VII of the Civil Rights Act of 1964, and the Family and Medical Leave Act of 1993 ("FMLA"). Barringer filed a motion to dismiss the FMLA claims and the motion was denied by the district court. Barringer then brought this appeal. We **affirm** the denial of Barringer's motion.

II. BACKGROUND

On May 26, 1999, Cornforth was terminated from her position as a medical staff secretary. Cornforth thereafter filed a complaint in federal district court naming both the University and Barringer as defendants. In the complaint, she asserted three claims against the University and three claims against Barringer, individually. Cornforth's claims against Barringer consisted of (1) a state law claim alleging intentional interference with an employment relationship, (2) a constitutional claim arising under 42 U.S.C. § 1983, and (3) a claim that Barringer acted in violation of FMLA.

The University and Barringer filed separate motions to dismiss. The district court concluded that the FMLA claims Cornforth raised against the University were barred by the Eleventh Amendment and granted the University's motion

to dismiss those claims.[1] The district court's conclusion was based on its determination that FMLA does not abrogate the states' sovereign immunity because it is not a valid exercise of Congress' enforcement powers under Section Five of the Fourteenth Amendment. In his motion to dismiss, Barringer argued that he is not an "employer" as that term is used in FMLA and thus cannot be held liable in his individual capacity for violations of FMLA. Barringer also argued that the Eleventh Amendment bars a federal court from hearing the FMLA claims Cornforth has asserted against him.[2]

The district court concluded that any FMLA claims asserted against Barringer in his official capacity were barred by the Eleventh Amendment. The court then concluded that Barringer was an employer under the FMLA and could be held individually liable for violations of the FMLA. The district court denied Barringer Eleventh Amendment immunity from the FMLA claims asserted against him in his individual capacity.

III. DISCUSSION

This court's jurisdiction over this interlocutory appeal arises pursuant to the collateral order doctrine. *See P.R.*

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1. "We have recognized that under Oklahoma law, the Board of Regents of the University [of Oklahoma] is an arm of the state . . . ." *Hensel v. Office of the Chief Admin. Hearing Officer*, 38 F.3d 505, 508 (10th Cir. 1994).

2. Barringer also moved to dismiss the state law claim Cornforth asserted against him. The district court granted Barringer's motion as to the state law claim and the issue is irrelevant to this appeal.

Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc., 506 U.S. 139, 144-47 (1993); *Innes v. Kan. State Univ.*, 184 F.3d 1275, 1277 (10th Cir. 1999). Questions involving Eleventh Amendment immunity are questions of law that this court reviews *de novo*. *See Sturdevant v. Paulsen*, 218 F.3d 1160, 1164 (10th Cir. 2000). Because our jurisdiction is limited, the sole issue before this court is whether the district court properly denied Barringer's motion to dismiss the FMLA claims on Eleventh Amendment immunity grounds.[3] *See Garramone v. Romo*, 94 F.3d 1446, 1452 (10th Cir. 1996). Before we can meaningfully address this issue, it is necessary to determine the nature of Cornforth's FMLA claims against Barringer.

In her complaint, Cornforth seeks "all damages or other relief allowed by the FMLA including liquidated damages." An employee who prevails in a civil suit brought pursuant to FMLA is entitled to both damages and appropriate equitable relief, "including employment, reinstatement, and promotion." 29 U.S.C. § 2617(a)(1). A fair reading of Cornforth's complaint leads to the conclusion that Cornforth is seeking both damages and reinstatement. It is unclear from the face of Cornforth's complaint, however, whether the FMLA claims were brought against Barringer in his individual capacity, his official capacity, or in both his individual and official capacities.[4]

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3. Although the University is listed as an appellant in this case, only Barringer's claim of entitlement to Eleventh Amendment immunity is properly before this court.

4. The caption of Cornforth's complaint simply names "Bill Barringer, an individual," as a defendant.

Appendix A

The district court apparently interpreted the complaint to include FMLA claims against Barringer in both his individual and official capacities. The district court denied Barringer's motion to dismiss any FMLA claims asserted against him in his individual capacity, specifically stating that "[Cornforth's] claims against defendant Barringer in his individual capacity under FMLA remain."

The district court also concluded that Barringer was "entitled to the immunity granted to defendant [University] for any official capacity claims under FMLA." The district court based this conclusion on a Supreme Court case in which the Court reiterated that suits seeking damages from state officials in their official capacities are, in reality, suits against the state barred by the Eleventh Amendment.[5] *See Hafer v. Melo*, 502 U.S. 21, 25 (1991) (holding a state official may be individually liable for damages based upon actions he takes in his official capacity). Cornforth has not appealed from this partial grant of immunity to Barringer because she is unable to bring such an appeal at this stage of the litigation. *See Clemens v. Kansas*, 951 F.2d 287, 288 (10th Cir. 1991) (holding that no interlocutory appeal may be taken from a

5. The district court did not analyze whether the *Ex parte Young* doctrine applies to Cornforth's claims for equitable relief brought against Barringer in his official capacity. *See Ex parte Young*, 209 U.S. 123, 159-60 (1908) (holding that the Eleventh Amendment generally does not bar official-capacity claims seeking prospective injunctive relief from a state official); *see also ANR Pipeline Co. v. Lafaver*, 150 F.3d 1178, 1188 (10th Cir. 1998) ("Under the *Ex parte Young* legal fiction, when an official of a state agency is sued in his official capacity for prospective equitable relief, he is generally not regarded as 'the state' for purposes of the Eleventh Amendment and the case may proceed in federal court.").

grant of Eleventh Amendment immunity). Accordingly, we express no opinion on the merits of the district court's partial grant of Eleventh Amendment immunity to Barringer but discuss the issue merely to clarify that to the extent Cornforth has asserted FMLA claims against Barringer in his official capacity those claims are not subject to this appeal. We therefore address only whether the FMLA claims brought against Barringer in his individual capacity for both money damages and equitable relief are barred by the Eleventh Amendment.

A. Claims for Damages

Eleventh Amendment immunity is available when suits seeking damages are brought directly against a state. *See Buchwald v. Univ. of N.M. Sch. of Med.*, 159 F.3d 487, 494 n.3 (10th Cir. 1998); *Johns v. Stewart*, 57 F.3d 1544, 1552 (10th Cir. 1995). As a general rule, suits seeking damages from state officials in their individual capacities are not barred by the Eleventh Amendment. *See Hafer*, 502 U.S. at 30-31; *Papasan v. Allain*, 478 U.S. 265, 277 n.11 (1986). "[A] suit for money damages may be prosecuted against a state officer in his individual capacity for unconstitutional or wrongful conduct fairly attributable to the officer himself, so long as the relief is sought not from the state treasury but from the officer personally." *Alden v. Maine*, 527 U.S. 706, 757 (1999). The Eleventh Amendment is not implicated in such suits because any award of damages will be satisfied from the individual's personal assets and will not be paid from the state treasury. If the sovereign is obligated to pay any damage award entered against the state official, however, the Eleventh Amendment bars the suit. *See Edelman v. Jordan*, 415 U.S. 651, 663 (1974).

Barringer initially argued that the State of Oklahoma is obligated under state law to indemnify him for any FMLA violations[6] and, consequently, Cornforth's claims against him for damages are barred by the Eleventh Amendment because any damage award Cornforth obtains would be satisfied from the state treasury. In his reply brief, Barringer concedes, as he must, that his position is unconditionally foreclosed by Circuit precedent. *See Griess v. Colorado*, 841 F.2d 1042, 1045-46 (10th Cir. 1988). Although state monies may ultimately be used to satisfy a judgment obtained against a state official sued in his individual capacity, a state cannot extend its sovereign immunity to its employees by voluntarily assuming an obligation to indemnify them. *See id.* Barringer next contends that an award of damages to Cornforth would effectively compel the University to comply with FMLA. Thus, he argues, the University is the real party in interest and the Eleventh Amendment bars federal courts from hearing Cornforth's FMLA claims against him for damages. *See Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 101 n.11 (1984) ("[A] suit is against the sovereign if the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration, or if the effect of the judgment would be to restrain the Government from acting, or to compel it to act."). Presumably, Barringer believes that an award of damages against him will prompt the University to comply with FMLA either to protect its employees from personal liability or to avoid any obligation it may have to indemnify its employees.

Barringer's argument, however, is based purely on conjecture and he has failed to demonstrate or even argue

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6. *See* Okla. Stat. Ann. tit. 51, § 162.

that a judgment against him individually for damages would *legally require* the University to comply with FMLA. The University may choose to comply with FMLA for any number of reasons, and Barringer has not demonstrated that a decision by the University to comply with FMLA in the wake of a damage award against him is any less a voluntary act than a state's choice to indemnify its employees. The compliance and any attendant costs would, in no way, be forced upon the University by the outcome of the federal suit, but would constitute a purely voluntary choice on the part of the University. Thus, Barringer's argument that the University is the real party in interest is essentially no different than the argument rejected by this court in *Griess*.

Barringer's arguments that the Eleventh Amendment bars the federal courts from hearing Cornforth's FMLA claims for damages against him in his individual capacity are without merit.[7]

B. Claims for Equitable Relief

Barringer advances three arguments in support of dismissal of Cornforth's FMLA claims against him individually for injunctive relief. Only two of those arguments, however, involve assertions that the claims are

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7. On appeal, Barringer has not asserted any personal immunity defenses to the claims against him for damages and, consequently, we do not address whether any would apply in this case. *See Kentucky v. Graham*, 473 U.S. 159, 166-67 (1985) ("[A]n official in a personal-capacity action may, depending on his position, be able to assert personal immunity defenses, such as objectively reasonable reliance on existing law.").

barred by the Eleventh Amendment. Barringer first contends that if he is ordered to reinstate Cornforth or provide her with FMLA benefits in the future, the University will be coerced into providing the relief, thereby eviscerating its Eleventh Amendment immunity. This argument has been considered and rejected by the Supreme Court.

In the seminal case of *Ex parte Young*, the Supreme Court made it clear that a private individual may sue a state official for prospective injunctive relief in federal court even if the Eleventh Amendment bars such claims from being brought against the state itself. *See* 209 U.S. 123, 159-60 (1908); *see also Green v. Mansour*, 474 U.S. 64, 68 (1985) (holding that federal courts have jurisdiction over claims against state officials seeking prospective injunctive relief "designed to end a continuing violation of federal law"). Thus, Barringer's argument that the University's immunity will be eviscerated if Cornforth obtains injunctive relief from him is totally without merit.

Barringer, however, also contends that this case presents an exception to the general rule that federal courts have jurisdiction over suits against state officials seeking prospective injunctive relief. That exception, first articulated by the Supreme Court in *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261 (1997), bars suits seeking relief that would "implicate[ ] special sovereignty interests." *Id.* at 281; *see also Buchwald*, 159 F.3d at 495 n.6. This court has held that *Coeur d'Alene* applies when the injunctive relief sought is "the functional equivalent to a form of legal relief against the state that would otherwise be barred by the Eleventh Amendment." *ANR Pipeline Co. v. Lafaver*, 150 F.3d 1178,

1190 (10th Cir. 1998) (quotation omitted). Barringer has failed to identify any such "special sovereignty interest" in this case but, instead, simply asserts that a grant of injunctive relief against Barringer would effectively require the University to comply with federal law. The Court has repeatedly held, however, that suits brought pursuant to *Ex parte Young* seeking to end a continuing violation of federal law are not barred by the Eleventh Amendment. *See, e.g., Green*, 474 U.S. at 68 ("Remedies designed to end a continuing violation of federal law are necessary to vindicate the federal interest in assuring the supremacy of that law."). Thus, the injunctive relief sought by Cornforth against Barringer does not implicate a special sovereignty interest and the *Coeur d'Alene* exception is inapplicable.

Barringer also argues that because the University will bear the ancillary costs of Barringer's compliance with any injunction, the University is the real party in interest and the claims are barred by the Eleventh Amendment. Barringer's argument was rejected by the Supreme Court in *Edelman v. Jordan*. *See* 415 U.S. at 665 ("State officials, in order to shape their official conduct to the mandate of the Court's decrees, would more likely have to spend money from the state treasury than if they had been left free to pursue their previous course of conduct. Such an ancillary effect on the state treasury is a permissible and often an inevitable consequence of the principle announced in *Ex parte Young* [ ].")

In addition to his Eleventh Amendment arguments, Barringer also asserts that Cornforth's claims against him for injunctive relief should be dismissed because he is not an "employer" as that term is defined in FMLA. *Compare*

Kilvitis v. County of Luzerne, 52 F. Supp. 2d 403, 411-16 (M.D. Pa. 1999), *with Keene v. Rinaldi*, 127 F. Supp. 2d 770, 774-78 (M.D.N.C. 2000). Barringer contends that the term "employer" should not be interpreted to include individual supervisors. He argues that such an interpretation would render the statute absurd because Barringer, in his individual capacity, is unable to provide the injunctive relief Cornforth seeks.

Our jurisdiction over this interlocutory appeal is strictly confined only to those issues involving the Eleventh Amendment. Because Barringer's argument does not involve a claim of Eleventh Amendment immunity, it is not properly before this court. Accordingly, we can not, and do not, express any opinion on whether Cornforth's FMLA claims for injunctive relief asserted against Barringer in his individual capacity should be dismissed either because Cornforth cannot obtain such relief against Barringer in his individual capacity[8] or because the term "employer" as used in FMLA should not be interpreted to include individual supervisors.

Barringer's arguments are either foreclosed by Supreme Court precedent or do not involve the Eleventh Amendment. We hold there is no Eleventh Amendment bar to federal court jurisdiction over Cornforth's claims against Barringer for prospective injunctive relief.

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8. *See, e.g., Hill v. Shelander*, 924 F.2d 1370, 1374 (7th Cir. 1991) ("[I]njunctive relief against a state official may be recovered only in an official capacity suit."); *Smith v. Plati*, 56 F. Supp. 2d 1195, 1203 (D. Colo. 1999) (dismissing claims against state official in his individual capacity because the relief plaintiff requested could only be obtained against the defendant in his official capacity).

IV. CONCLUSION

That portion of the order entered by the district court in which the court denied Barringer's motion to dismiss the FMLA claims asserted against him in his individual capacity on Eleventh Amendment grounds is **affirmed.** Cornforth's application to supplement her answer brief is **denied** because the issues addressed are not properly before this court.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA RE DEFENDANT BOARD OF REGENTS' MOTION TO DISMISS DATED AND FILED MARCH 3, 2000

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

CIV-99-1840-A

RETTA E. CORNFORTH,

Plaintiff,

v.

THE BOARD OF REGENTS OF THE UNIVERSITY OF OKLAHOMA, d/b/a UNIVERSITY OF OKLAHOMA HEALTH SCIENCES CENTER AT OKLAHOMA CITY, and BILL BARRINGER,

Defendants.

ORDER

Before the Court are defendant Board of Regents' motion to dismiss, plaintiff's response, and defendant's reply. Defendant seeks to dismiss the instant action on the following grounds: (1) no public policy right to a state law tort claim for wrongful discharge based on pregnancy discrimination or the Family Medical Leave Act of 1993, 29 U.S.C. §2603 *et seq.* ("FMLA"); (2) defendant is entitled to Eleventh Amendment sovereign immunity regarding plaintiff's FMLA

claims; (3) the amended complaint does not state a claim for gender-based discrimination or retaliation; and (4) the amended complaint does not state a claim for pregnancy-based retaliation. Based on the pleadings before the Court, the Court grants in part and denies in part defendant's motion to dismiss.

Standard of Review

A motion to dismiss may only be granted if it appears plaintiff can prove no set of facts entitling her to relief. *Yoder v. Honeywell, Inc.*, 104 F.3d 1215, 1224 (10th Cir.), *cert. denied*, 522 U.S. 812 (1997). The plaintiff's allegations contained in her complaint are taken as true. *Id.*

Immunity

Defendant argues it is entitled to Eleventh Amendment immunity concerning plaintiff's FMLA claims in accordance with the United States Supreme Court's decision in *Kimel v. Florida Bd. of Regents*, __ U.S. __, 120 S.Ct. 631 (2000). In *Kimel*, the Supreme Court stated "the Constitution does not provide for federal jurisdiction over suits against nonconsenting States." *Id.* at 640. "Congress may abrogate the States' constitutionally secured immunity from suit in federal court only by making its intention unmistakably clear in the language of the statute." *Id.* (citations and quotations omitted). The Supreme Court found the Age Discrimination in Employment Act ("ADEA") explicitly abrogated the state's sovereign immunity. *Id.* at 641.

If a statute has clearly abrogated a state's immunity, the second question is whether such abrogation is constitutionally

appropriate. Article 1 of the Commerce Clause is no basis for the authority to abrogate a state's sovereign immunity. *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 72-73 (1996). Because ADEA rested entirely on Article 1 of the Commerce Clause, the Supreme Court found it could not properly abrogate a state's immunity. *Kimel*, 120 S.Ct. at 643.

The Supreme Court then examined whether the ADEA could properly abrogate a state's immunity under Section 5 of the Fourteenth Amendment. Section 5 permits the abrogation of sovereign immunity where needed to "secure the guarantees of the Fourteenth Amendment." *Id.* at 644 (citations and quotations omitted). This power includes "the authority both to remedy and to deter violation of rights guaranteed thereunder by prohibiting a somewhat broader swath of conduct, including that which is not itself forbidden by the [Fourteenth] Amendment's text." *Id.* The issue becomes whether the legislation is "remedial or instead effects a substantive redefinition of the Fourteenth Amendment right at issue." *Id.* "[R]ecognizing that Congress must have wide latitude in determining where [that line] lies, we held that there must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." *Id.* at 645 (citations and quotations omitted).

To determine whether congruence and proportionality exist, the Court must examine the legislative history of the legislation in question, and then determine whether the legislation disproportionately attempts to remedy the constitutional violation. *Id.* at 645. The Supreme Court found that the ADEA had little or no pattern of unconstitutional

behavior by states in evaluating employees based on their age, and thus, abrogating their sovereign immunity was out of proportion to any potential age discrimination claims it was designed to prevent. *Id.* "Age classifications, unlike governmental conduct based on race or gender, cannot be characterized as so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy." *Id.* (citations and quotations omitted). "Older persons, again, unlike those who suffer discrimination on the basis of race or gender, have not been subjected to a history of purposeful unequal treatment." *Id.* at 645 (citations and quotations omitted). Further, unlike age classifications, gender based classifications are considered suspect and such classifications are constitutional only if they "serve important governmental objectives and the discriminatory means employed are substantially related to the achievement of those objectives." *Id.* Recitation to legislative history must show a national impact and relate to the public sector, not merely the private sector. *Id.* at 649.

Here, Congress clearly abrogated a state's sovereign immunity under FMLA. FMLA defines an employer to include a state or state entity. 29 U.S.C. §2611(3). FMLA's enforcement provision provides that any employer who violates FMLA shall be liable to a private individual. 29 U.S.C. §2617. This language is sufficient to establish a congressional intent to abrogate a state's sovereign immunity. *See Kimel, supra*, 120 S.Ct. at 641. The next question is whether FMLA is a valid exercise of power. Congress states the purpose of FMLA is:

> (4) to accomplish the purposes described [herein] in a manner that, consistent with the Equal Protection Clause of the Fourteenth Amendment, minimizes the potential for employment discrimination on the basis of sex by ensuring generally that leave is available for eligible medical reasons (including maternity-related disability) and for compelling family reasons, on a gender-neutral basis; and
>
> (5) to promote the goal of equal employment opportunity for women and men, pursuant to such license.

29 U.S.C. §2601(b). This reflects a purported exercise of congressional power pursuant to the Equal Protection Clause of the Fourteenth Amendment. *Garrett v. University of Alabama*, 193 F.3d 1214, 1227 (11th Cir. 1999) (dissenting opinion addressing constitutionality of FMLA and state sovereign immunity), *pet. for cert. filed*, January 24, 2000. However, a review of FMLA in its entirety reflects a gender-neutral position so that all eligible employees may seek leave under FMLA.

The congressional history of FMLA does not establish a congruence and proportionality analysis sufficient to meet constitutional standards. The dissent in *Garret* cites to a statement that public sector employees suffer comparable sex discrimination problems with regard to leave as private sector employees. *Garrett, supra*, 193 F.3d at 1230 n.13 (*citing The Parental and Medical Leave Act of 1986: Joint Hearing Before the Subcomm. on Labor Management Standards of*

the House Comm. on Education and Labor, 99th Cong. 146, 147 (1986)). However, this statement by a representative is not supported by adequate statistical data. Further, legislators indicated that FMLA combats sex and disability discrimination for which Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000b ("Title VII"), and Pregnancy Discrimination Act, 42 U.S.C. §2000e(K) ("PDA"), have proven inadequate. H.R.Rep. No. 103-8, pt. 1, at 28 (1993): H.R.Rep. no. 100-511, pt. 2, at 22, 24 (1988) *Family and Medical Leave Act of 1987: Joint Hearing Before the Subcomm. on Civil Service and the Subcomm. on Compensation and Employee Benefits of the House Comm'n on Post Office and Civil Service*, 100th Cong. 31, 32 (1987).

These statements are insufficient to survive the Supreme Court's ruling in *Kimel* that to support a proportionality argument nationwide studies directed to the public sector must reflect a widespread pattern of constitutional violations and that the legislation effectively combats such violation. *Kimel*, *supra*, 120 S.Ct. at 649. The conclusory statements of congressional members concerning FMLA do not establish a widespread problem which cannot be remedied by Title VII or PDA. Moreover, the legislation itself is broad in scope to include those employees who have never been discriminated against and who could not maintain an action under Title VII or PDA. Although FMLA does have internal limitations on who may apply for leave, these do not reflect an equal protection remedy. Courts that have addressed this issue have found that FMLA has not validly abrogated state's sovereign immunity under Section 5 of the Fourteenth Amendment. *See Cohen v. Nebraska*, __ F.Supp.2d __, 2000 WL 149634 (D. Neb. Feb. 8, 2000); *Garrett v. University of*

Alabama, supra 193 F.3d at 1220; *Sims v. University of Cincinnati*, 46 F.Supp.2d 736 (S.D.Ohio 1999); *Darby v. Hinds County Dept. of Human Services*, __ F.Supp.2d __, 1999 WL 1426105 (S.D.Miss. Aug. 11, 1999); *Post v. State of Kansas*, 1998 WL 928677 (D.Kan. Dec. 10, 1998); *Driesse v. Florida Bd. of Regents*, 26 F.Supp.2d 1328 (M.D.Fla. 1998); *McGregor v. Goord*, 18 F.Supp.2d 204 (N.D.N.Y. 1998); *Thomson v. Ohio State Univ. Hosp.*, 5 F.Supp.2d 574 (S.D.Ohio 1998). Two cases have held state's are not entitled to sovereign immunity under FMLA. *See Knussman v. State of Maryland*, 935 F.Supp. 659 (D.Md. 1996); *Biddlecome v. University of Texas*, 1997 WL 124220 (S.D.Tex. 1997). However, these two cases did not address the second portion of *Kimel*, i.e. whether FMLA's provisions were a proper exercise of constitutional power under Section 5 of the Fourteenth Amendment and whether the remedy meets the congruence and proportionality test of Supreme Court precedent. FMLA exceeds enforcement of the Equal Protection Clause by creating a statutory right to 12 weeks of leave to eligible employees. Accordingly, defendant's motion to dismiss plaintiff's FMLA claims based on sovereign immunity is granted.

Alternatively, plaintiff argues the State of Oklahoma has waived its immunity regarding FMLA claims by enacting an Oklahoma Family Medical Leave Act. Oklahoma does not have a Family Medical Leave Act generally applicable to employees in the State of Oklahoma or even for all state employees. Rather, the Office of Personnel Management is required to promulgate rules implementing FMLA to certain state employees. Okla. Stat. tit. 74, §840-2.22. It is not clear whether University of Oklahoma employees would be

covered under these rules, as the University is governed by the Oklahoma State Board of Regents. See Okla. Stat. tit. 70, §3305. Thus, Oklahoma has not clearly waived its right to sovereign immunity in spite of the enactment of Okla. Stat. tit. 74, §840-2.22. Defendant's motion to dismiss is granted.

Gender Discrimination/Retaliation

In Count I of her amended complaint, plaintiff alleges that defendant violated her rights under Title VII, including PDA. In her factual allegations, plaintiff states defendant discriminated against her based on her gender and pregnancy as she worked for defendant since 1994, and was terminated while on sick leave for pregnancy-related complications. Plaintiff alleges she notified defendant Bill Barringer, her supervisor, of her medical condition. He requested she keep him informed of her condition. When plaintiff attempted to notify defendant Barringer of her medical status and that she could return to work within one week, she was informed she had been terminated and replaced by his girlfriend. She further alleges that she was treated less favorably than male employees who took comparable amounts of leave. Defendant argues that the amended complaint should be dismissed because plaintiff has not established a prima facie case for gender-based discrimination by failing to allege she satisfactorily performed her job and by failing to specify how male counterparts were treated more favorably.

Plaintiff need not establish her prima facie case at the motion to dismiss stage. Rather, the question is whether the amended complaint sufficiently apprizes defendant of her

gender-based discrimination claims. *Corbin v. Runyon*, 188 F.3d 518 (table, text in Westlaw) 1999 WL 590749 (10th Cir. Aug. 6, 1999). There is a "powerful presumption against rejecting pleadings for failure to state a claim." *Cayman Exploration Corp. v. United Gas Pipe Line Co.*, 873 F.2d 1357 (10th Cir. 1989). "Indefiniteness of a complaint is not ground for dismissing the action if it states a claim showing that the plaintiff is entitled to relief." *Porter v. Karavas*, 157 F.2d 984, 985 (10th Cir. 1946).

Plaintiff's failure to allege she satisfactorily performed her job and how male counterparts were treated more favorably do not warrant dismissal of the instant complaint. *See e.g. Corbin v. Runyon, supra*, 1999 WL 509749, *3 (failure to specifically state how male counterparts were treated more favorably did not warrant dismissal of complaint for gender discrimination). The Court finds the incorporated factual allegations combined with plaintiff's specific statements that these actions constitute a violation of Title VII and PDA for gender-based discrimination is sufficient to withstand defendant's motion to dismiss.

Defendant also suggests that Count I of the amended complaint should be dismissed because plaintiff has failed to state a claim for gender-based or pregnancy-based retaliation by failing to allege protected opposition to gender-based or pregnancy-based discrimination prior to her termination. Once again, plaintiff need not establish a prima facie case of discrimination at this stage of the proceedings. However, she does need to indicate that she was terminated in response to opposing gender-based or pregnancy-based discrimination. Plaintiff was terminated while on medical

leave. She was not terminated for expressing any opposition to pregnancy-based or gender-based discrimination. In essence, plaintiff alleges an FMLA retaliation claim which can be established by alleging she engaged in activity protected under FMLA. *Richmond v. ONEOK, Inc.*, 120 F.3d 205, 208-09 (10th Cir. 1997). However, because defendant is entitled to sovereign immunity on plaintiff's FMLA claims, her FMLA retaliation claim likewise fails, and cannot support her retaliation claims on other grounds. Defendant's motion to dismiss plaintiff's retaliation claims is granted. Defendant's motion to dismiss plaintiff's gender-based discrimination claims is denied.

State Law Tort Claim

In Count III of her amended complaint, plaintiff alleges her claims of gender-based discrimination, pregnancy-based discrimination, retaliation, and claims under FMLA entitle her to a state law tort claim for violation of Oklahoma's Family Medical Leave Act and Oklahoma's Anti- discrimination Act. Defendant contends that Oklahoma does not have a Family Medical Leave Act and that no state law incorporates FMLA into state public policy. Additionally, defendant asserts that the Oklahoma Anti-discrimination Act does not incorporate pregnancy-based discrimination claims[1] because Oklahoma statutes have not been amended to include the PDA.

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1. Defendant argues that because plaintiff failed to allege a gender-based discrimination claim, her claim is based on pregnancy discrimination only. The Court finds ample state law to support a state public policy against gender-based discrimination in Oklahoma regarding plaintiff's claims she was treated less favorably than her male counterparts who took similar amounts of leave.

Appendix B

Oklahoma clearly has a public policy against discrimination based on race, color, religion, sex, national origin, age or handicap. Okla. Stat. tit. 25, §1301 *et seq*. Prior to the amendment of Title VII, the United States Supreme Court found that pregnancy-based discrimination was not the equivalent of gender-based discrimination, and thus, claims regarding pregnancy could not be maintained under Title VII. *See Geduldig v. Aiello*, 417 U.S. 484 (1974). Congress enacted PDA as an amendment to Title VII in response to the Supreme Court's construction, finding pregnancy-based claims are claims based on gender discrimination. *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 791 (1993).

Oklahoma adopted Title VII of the Civil Rights Act of 1964. Okla. Stat. tit. 25, §§1101, 1301 *et seq*. However, defendant claims Oklahoma has not adopted the amendment to Title VII by PDA. A review of the Oklahoma Anti-discrimination Act reflects that PDA is incorporated. According to Okla. Stat. tit. 25, §1101 regarding construction of the Oklahoma Anti-discrimination Act, the purposes of the Act are to provide the execution of the policies embodied in the federal Civil Rights Act of 1964. In a footnote to this section, the Oklahoma legislature indicates that the policies of the Civil Rights Act of 1964 include the following statutes: 28 U.S.C.A. §1447; 42 U.S.C. §§ 1971, 1975a to 1975d, 2000a to 2000h-6 (emphasis added). PDA is located at 42 U.S.C. §2000e(K). Because the statute clearly contemplates the incorporation of all sections between 2000a and 2000h-6, PDA's policies are incorporated into the Oklahoma Anti-discrimination Act. Oklahoma's recent broadening of state law tort claims based on Oklahoma public policy provide plaintiff with a state pregnancy-based discrimination

claim. *See e.g. Collier v. Insignia Financial Group*, 981 P.2d 321, 1999 WL 326277 (Okla. 1999). Defendants' motion to dismiss is denied on this ground.

Further, plaintiff's gender-based discrimination claims not relating to her specific pregnancy-based discrimination claims, i.e. male counterparts were not terminated for taking similar periods of medical leave, is a proper claim under Oklahoma state public policy. As discussed above, Oklahoma has enacted the Anti-discrimination Act which prohibits gender-based discrimination. "Oklahoma law recognizes an exception to the at-will employment relationship when 'the discharge is contrary to a clear mandate of public policy as articulated by constitutional, statutory or decisional law.' " *Richmond, supra*, 120 F.3d at 210 (*citing Burk v. K-Mart Corp.*, 770 P.2d 24 (Okla. 1989)). "The *Burk* exception to at-will employment, however, is a narrow one, and is to be 'tightly circumscribed.' " *Id.* Nonetheless, where a state public policy is found, a plaintiff may state a claim under Oklahoma tort law despite the adequacy of federal remedies. *Collier v. Insignia, supra*. Here, Okla. Stat. tit. 25, §1301 *et seq*. clearly provides an Oklahoma public policy against gender-based discrimination. Defendants' motion to dismiss is denied on this ground.[2]

Next, defendant argues Oklahoma does not have a Family Medical Leave Act, and plaintiff cannot state a claim for

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2. Nonetheless, the Court has previously found that plaintiff has failed to state a claim for gender-based or pregnancy-based retaliation, and therefore, cannot maintain such actions under Oklahoma state law. Any retaliation claims would be based on FMLA, which Oklahoma has not clearly adopted as a public policy.

violation of state public policy. Pursuant to Okla. Stat. tit. 74, §840-2.22, the Administrator of the Office of Personnel Management must promulgate rules necessary to comply with the federal Family Medical Leave Act. Moreover, Okla. Stat. tit. 11, §50-122 provides that military leaves of absence or credits for military service shall include a period of absence under the Family Medical Leave Act of 1993. No other statute or case law has been presented to the Court or found regarding the Family Medical Leave Act in Oklahoma. Arguably, the Oklahoma legislature has created a state policy incorporating FMLA regarding certain state employees. However, not all of the Oklahoma Personnel Act's provisions are applicable to the University of Oklahoma. *See* Okla. Stat. tit. 74, §840-2.1 (regarding affirmative actions plans); Okla. Stat. tit. 70, §3305 (setting forth governing powers for the Board of Regents over the University of Oklahoma). Oklahoma has not established a public policy against violations of FMLA for all state employees, to include employees of the University of Oklahoma. Plaintiff has failed to state an Oklahoma state law tort claim for FMLA violation. Unless and until the Oklahoma legislature or Oklahoma case law establishes that FMLA is applicable to University of Oklahoma employees, or to all Oklahoma employees, no state law tort exception to the at-will employment doctrine exists. *See Richmond, supra*, 120 F.3d at 210 (*citing Burk, supra*). Defendant's motion to dismiss plaintiff's state law FMLA claims is granted.

Appendix B

Conclusion

Based on the foregoing, defendant's motion to dismiss is GRANTED IN PART AND DENIED IN PART. Plaintiff's FMLA claims including any purported retaliation claims and state law public policy tort claims based on FMLA are dismissed. Plaintiff's gender-based and pregnancy-based retaliation claims are dismissed for failure to state a claim. All other claims against defendant Board of Regents concerning plaintiff's gender-based and pregnancy-based discrimination claims and state law public policy tort claims based on gender and pregnancy discrimination remain.

IT IS SO ORDERED this 3rd day of March, 2000.

s/ Wayne E. Alley
WAYNE E. ALLEY
UNITED STATES DISTRICT
JUDGE

APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA RE DEFENDANT BILL BARRINGER'S MOTION TO DISMISS DATED AND FILED MARCH 3, 2000

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

CIV-99-1840-A

RETTA E. CORNFORTH,

Plaintiff,

v.

THE BOARD OF REGENTS OF THE UNIVERSITY OF OKLAHOMA, d/b/a UNIVERSITY OF OKLAHOMA HEALTH SCIENCES CENTER AT OKLAHOMA CITY, and BILL BARRINGER,

Defendants.

ORDER

Before the Court are defendant Bill Barringer's motion to dismiss, plaintiff's response, and defendant's reply. Defendant Barringer seeks dismissal of the instant action as plaintiff has failed to allege a contractual relationship exists, supporting a claim for intentional interference with contractual relationships, and that there is no individual liability for violations of the Family Medical Leave Act of 1993, 29 U.S.C. §2603 *et seq.* ("FMLA"). Plaintiff contends

individual liability is appropriate under FMLA, and that defendant Barringer interfered with her employment relationship despite the existence of at-will employment. Based on the pleadings before the Court, the Court grants in part and denies in part defendant Barringer's motion to dismiss.

Standard of Review

A motion to dismiss may only be granted if it appears plaintiff can prove no set of facts entitling her to relief. *Yoder v. Honeywell, Inc.*, 104 F.3d 1215, 1224 (10th Cir.), *cert. denied*, 522 U.S. 812 (1997). The plaintiff's allegations contained in her complaint are taken as true. *Id.*

Interference with Employment Relationship

Defendant Barringer argues that because plaintiff was an at-will employee, she cannot establish a claim for intentional interference with an employment relationship. Plaintiff argues that she need not show an actual contract existed to state a claim.

The Tenth Circuit Court of Appeals has found a plaintiff must establish a contractual relationship with her employer to hold a supervisor responsible for intentional interference with employment relationships. *Milatz v. Frito-Lay, Inc.*, 106 F.3d 413 (table, text in Westlaw) 1997 WL 12933 (10th Cir. Jan. 15, 1997) (unpublished disposition) (*citing Tatum v. Philip Morris, Inc.*, 809 F.Supp. 1452, 1468 (W.D.Okla. 1992), *aff'd* 16 F.3d 417 (10th Cir. 1993), *cert. denied*, 511 U.S. 1083 (1994). Plaintiff has not alleged that she had a contractual relationship with her employer. In Oklahoma all

employment is considered to be at-will unless the plaintiff alleges circumstances creating a constructive contract with the employer, which plaintiff has not done here. *Vice v. Conoco, Inc.*, 150 F.3d 1286, 1288 (10th Cir. 1988). In this regard, plaintiff has failed to state a claim for intentional interference with contractual or employment relations. Defendant's motion to dismiss is granted on this ground.

Individual Liability

Next, defendant Barringer contends he is not subject to individual liability under the FMLA. The parties recognize that there is a split in authority regarding whether an individual supervisor may be held individually liable under FMLA. *See e.g. Wascura v. Carver*, 169 F.3d 683 (11th Cir. 1999) (finding public official sued in individual capacity is not an employer subject to suit under FMLA); *Frizzell v. Southwest Motor Freight, Inc.*, 906 F.Supp. 441, 449 (E.D.Tenn. 1995) (holding definition of employer in FMLA should be construed the same as employer under Title VII). *Cf. Buser v. Southern Food Service, Inc.*, 73 F.Supp.2d 556, 561 (M.D.N.C. 1999) (holding individual liability under FMLA is the majority view); *Kilvitis v. County of Luzerne*, 52 F.Supp.2d 403, 412 (M.D.Pa. 1999) (finding individual liability for defendants that are state actors even though immunity has been granted to defendant for whom individuals worked).

The Court finds the rationale of *Kilvitis* and the majority of courts persuasive in the instant case. Defendant Barringer is entitled to the immunity granted to defendant Board of Regents for any official capacity claims under FMLA.

See Hafer v. Melo, 502 U.S. 21, 25 (1991). Even though plaintiff's claims against defendant Barringer are directed against him as her supervisor and as an employee of defendant Board of Regents, he is subject to individual liability under FMLA.

FMLA defines "employer" to include "any person who acts directly or indirectly in the interest of an employer to any of the employees of such employer." 29 U.S.C. §2611(4)(A)(ii)(1). This language reflects an intent to hold supervisory employees individually liable for their actions. *See e.g. Kilvitis*, *supra*, 52 F.Supp.2d at 411-12. The language of FMLA tracks the language of the Fair Labor Standards Act, 29 U.S.C. §201 *et seq.* ("FLSA"). FLSA provides for individual liability, including individual liability for public officials. *See Kilvitis*, 52 F.Supp.2d at 413-15 (*citing* the majority of opinions finding individual liability under FMLA and FLSA). Because of FMLA's broad definition of employer, the Court finds individual liability appropriate despite defendant Board of Regents' entitlement to sovereign immunity. Defendant Barringer's motion to dismiss individual capacity claims under FMLA is denied.

CONCLUSION

Defendant's motion to dismiss is GRANTED IN PART AND DENIED IN PART. Plaintiff's intentional interference with employment/contractual relations claim is dismissed. Plaintiff's claims against defendant Barringer in his individual capacity under FMLA remain.

Appendix C

IT IS SO ORDERED this 3rd day of March, 2000.

s/ Wayne E. Alley
WAYNE E. ALLEY
UNITED STATES DISTRICT
JUDGE

APPENDIX D — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT DENYING PETITION FOR REHEARING DATED AND FILED SEPTEMBER 21, 2001

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 00-6119

RETTA E. CORNFORTH,

Plaintiff – Appellee,

v.

UNIVERSITY OF OKLAHOMA BOARD OF REGENTS, d/b/a University of Oklahoma Health Sciences Center; BILL BARRINGER,

Defendants – Appellants.

ORDER

Filed September 21, 2001

Before **BRISCOE** and **MURPHY**, Circuit Judges, and **CROW***, District Judge.

Appellants' petition for rehearing is denied by the panel that rendered the decision.

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* The Honorable Sam A. Crow of the United States District Court for the District of Kansas, sitting by designation.

Appendix D

The suggestion for rehearing en banc was transmitted to all of the judges of the court who are in regular active service as required by Fed. R. App. P. 35. No member of the panel and no judge in regular active service on the court requested that the court be polled on rehearing en banc so the suggestion for rehearing en banc is also denied.

Entered for the Court

PATRICK FISHER, Clerk of Court

by: s/ Opal A. Carter
Deputy Clerk

APPENDIX E — RELEVANT STATUTES

29 U.S.C. § 2611(4)

§ 2611. Definitions

As used in this subchapter:

* * *

(4) Employer

(A) In general

The term "employer" —

(i) means any person engaged in commerce or in any industry or activity affecting commerce who employs 50 or more employees for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year;

(ii) includes —

(I) any person who acts, directly or indirectly, in the interest of an employer to any of the employees of such employer; and

(II) any successor in interest of an employer;

(iii) includes any "public agency", as defined in section 203(x) of this title; and

(iv) includes the General Accounting Office and the Library of Congress.

(B) Public agency

For purposes of subparagraph (A)(iii), a public agency shall be considered to be a person engaged in commerce or in an industry or activity affecting commerce.

* * *

29 U.S.C. § 2612(a)(1)

§ 2612. Leave requirement

(a) In general

(1) Entitlement to leave

Subject to section 2613 of this title, an eligible employee shall be entitled to a total of 12 workweeks of leave during any 12-month period for one or more of the following:

(A) Because of the birth of a son or daughter of the employee and in order to care for such son or daughter.

Appendix E

(B) Because of the placement of a son or daughter with the employee for adoption or foster care.

(C) In order to care for the spouse, or a son, daughter, or parent, of the employee, if such spouse, son, daughter, or parent has a serious health condition.

(D) Because of a serious health condition that makes the employee unable to perform the functions of the position of such employee.

* * * *